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13 CRUMP INSURANCE SERVICES, INC.,

14 Plaintiff,

15 v.

16 MICHAEL P. MCGRATH, an individual,
17 ALL RISKS, LTD., a corporation, and
18 Does 1 through 50, inclusive,

19 Defendants.

20 Case No. C-07-4636 MMC (JL)

21 **PLAINTIFF CRUMP INSURANCE
22 SERVICES, INC.'S OPPOSITION TO
23 DEFENDANT ALL RISKS, LTD.'S
24 MOTION TO COMPEL**

25 Date: August 6, 2008
26 Time: 9:30 a.m.
27 Chief Magistrate Judge James Larson
28 Courtroom: F

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE ISSUES TO BE DECIDED

(1) Is All Risks entitled to broker of record letters regarding customers who may have followed a Crump employee elsewhere, where there is no evidence that the employee committed any of the wrongdoing that Defendants have committed?

(2) Are broker of record letters regarding customers who moved from All Risks to Crump relevant to All Risks' unclean hands defense, even though there is no evidence that any of those customers are at issue in this lawsuit and no evidence that Crump misappropriated All Risks' trade secrets, used confidential information to recruit All Risks' employees, or breached a fiduciary duty to All Risks?

(3) May All Risks continue to seek to compel the production of documents that Crump's counsel has already clearly stated do not exist or have already been produced?

INTRODUCTION

All Risks erroneously asserts that “[t]his lawsuit is centered around the alleged illegality of retailers moving from Crump to All Risks while continuing to work with the same broker.” *All Risks’ MPA* at 11:8-9. This is dead wrong. There is no dispute that retailers are permitted to move from Crump to All Risks while continuing to work with the same broker. Instead, what this case is about is McGrath’s using Crump’s confidential information to recruit Crump employees to leave Crump while he was on Crump’s payroll, in violation of California law and in breach of his employment contract, and McGrath and All Risks’ misappropriating Crump’s trade secrets in the form of Crump’s customer lists and other customer information.

The unambiguous paper trail shows that, while McGrath was Crump’s Executive Vice President, he negotiated a compensation package for his Crump assistant, Cyndi Marty, to leave Crump with him and join All Risks. While McGrath was Crump’s Executive Vice President, and in advance of a dinner meeting with All Risks’ President Nick Cortezi, McGrath wrote to Cortezi, “Good to go with Cyndi on the 16th...Need to look into Cyndi and guarantee for min of 3 yr. Salary plus bonus. Otherwise will not be interested.” *Declaration of Dylan B. Carp*, executed July 16, 2008 (“Carp Dec”), Ex. A at ALL000015. Cortezi replied, “would you let me know

1 Cyndi's total comp numbers so that I can work them into the equation?" *Carp Dec*, Ex. A at
 2 ALL000015. After the dinner, McGrath responded, "[a]s mentioned earlier we are set and
 3 comfortable for a min of 5-6 years... Based on our revenue projections for this year and next we
 4 would need the following: [¶] 6 Year Deal [¶] Mike [Redacted] min [¶] Cyndi [Redacted] min...
 5 Does not make sense for us to move anywhere if the years and salaries are not guaranteed." *Carp*
 6 *Dec*, Ex. A at p. ALL000014. McGrath readily admits that he did not act in Crump's best
 7 interests by negotiating terms for Marty with All Risks while he was still a Crump employee.
 8 (*Carp Dec*, Ex. B.) As such, by his own admission, he breached the duty of loyalty he owed to
 9 Crump.

10 Crump is suing McGrath for this outrageous and blatant breach of his fiduciary duty of
 11 loyalty to Crump. Crump is also suing All Risks and McGrath for misappropriating Crump's
 12 trade secrets in the form of customer lists and other customer information. All Risks repeatedly
 13 and erroneously alleges that Crump is suing All Risks or McGrath to enforce a non-compete
 14 agreement. Indeed, All Risks' motion is predicated on this fundamental misreading of Crump's
 15 complaint, which is why it should be denied.

16 STATEMENT OF FACTS

17 The background facts surrounding this discovery dispute are set forth in Crump's
 18 previously-filed Motion to Compel, also set for hearing on August 6, 2008.

19 All Risks omitted one key fact from its Memorandum of Points and Authorities
 20 regarding the parties' meet and confer efforts. In a letter from Crump's counsel to All Risks'
 21 counsel, we stated, "please understand that ***we have not withheld any responsive documents***
 22 ***from production***, other than as identified in our privilege logs," that "we have made a good faith
 23 effort to ascertain whether any additional responsive documents exist," and that "[w]e will serve
 24 amended responses indicating which categories, if any, did not contain any responsive
 25 documents." *Declaration of Kristen L. Williams in Support of Defendant All Risks, LTD.'s*
 26 *Motion to Compel Responses to its Discovery Requests*, executed July 1, 2008, Ex. R at 1
 27 (emphasis in original).

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ARGUMENT

I. RFP No. 39: Change of broker letters regarding Cheryl Smith are irrelevant.

This RFP seeks all change of broker letters that relate to accounts previously handled by Cheryl Smith, a former Crump employee, that changed to her new employer. “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.” Fed. R. Civ. P. 26(b)(1). However, “District courts need not condone the use of discovery to engage in ‘fishing expeditions.’” *Rivera v. NIBCO*, 364 F.3d 1057, 1072 (9th Cir. 2004). Here, any broker of record letters regarding the move of an unrelated third party (Smith) to an unrelated third party (her new employer) would be irrelevant to Crump’s claims or Defendants’ defenses in this lawsuit. Crump claims that one or both of All Risks and McGrath solicited Crump employees using confidential information in violation of the fiduciary duty of loyalty, misappropriated Crump’s trade secrets, and interfered with Crump’s employees and customers.

As noted above, documents produced during discovery show that McGrath was negotiating with All Risks to hire away Marty from Crump, even though McGrath was on Crump's payroll in a position of trust as Executive Vice President. Any broker of record letters regarding Smith would be irrelevant to these claims. Further, they would be equally irrelevant to any of All Risks' or McGrath's defenses. All Risks makes no showing that Smith breached her duty of loyalty to Crump by soliciting Crump employees while employed by Crump, misused Crump's confidential information, misappropriated Crump's trade secrets, or intentionally interfered with Crump's customers or employees. Even if there were evidence of such wrongdoing by Smith, All Risks does not explain why that would be relevant to any of Defendants' defenses in this lawsuit.

All Risks argues that any responsive documents would be relevant to “whether Crump is consistent in its claims.” *All Risks’ MPA* at 10:7-11. This argument is meritless for each of two reasons. First, consistency in whether and when to file lawsuits against unrelated third parties is not an element of any of Crump’s claims or Defendants’ defenses, and is therefore irrelevant.

1 Second, even if consistency in suing third parties were relevant, broker of record letters
 2 regarding Smith would not show any inconsistency whatsoever. All Risks apparently thinks that
 3 Crump is suing All Risks and McGrath solely because McGrath left Crump and took some
 4 customers with him in breach of a non-solicitation agreement. However, All Risks completely
 5 misreads Crump's complaint. To the contrary, as noted above, Crump is suing McGrath because
 6 he breached his fiduciary duty to Crump and misused Crump's confidential information. Crump
 7 is suing both McGrath and All Risks because they misappropriated Crump's trade secrets and
 8 interfered with Crump's employees and customers. It is those wrongful acts that are at issue in
 9 this lawsuit, not the mere fact of McGrath's departure with customers to All Risks. Thus, the
 10 mere existence of any broker of record letters regarding Smith would say nothing about whether
 11 Smith or her new employer breached a fiduciary duty owed to Crump, used Crump's
 12 confidential information, misappropriated Crump's trade secrets, or interfered with Crump's
 13 employees or customers, which are the claims that Crump makes in this lawsuit against McGrath
 14 and All Risks.

15 All Risks also argues that any responsive documents would "prove that it is an accepted
 16 and common industry practice for retailers to move with brokers when they change employers."
 17 *All Risks' MPA* at 10:12-13. However, whether there is such a common industry practice is
 18 inapposite to Crump's claims or Defendants' defenses. Defendants have not and cannot allege
 19 that there is any "practice" that would permit McGrath to breach his fiduciary duty of loyalty to
 20 Crump by soliciting Crump employees to leave while he was on Crump's payroll or permit
 21 McGrath or All Risks to misappropriate Crump's trade secrets or commit any of the other
 22 wrongful acts that Crump alleges. Thus, this request does not seek relevant documents.

23 **II. RFP No. 40: Change of broker letters from All Risks to Crump are irrelevant.**

24 This RFP seeks all change of broker letters during the last five years naming Crump in
 25 place of All Risks. However, any such broker of record letters would be irrelevant to Crump's
 26 claims that McGrath breached his fiduciary duty of loyalty to Crump and misused Crump's
 27 confidential information and that McGrath and All Risks misappropriated Crump's trade secrets
 28 and interfered with Crump's employees and customers. Any such letters would be equally

1 irrelevant to any of Defendants' defenses.

2 All Risks argues that “[w]hether or not retailers have moved from All Risks to Crump is
 3 clearly relevant to this case.” *All Risks MPA* at 11:9-10. All Risks is wrong. Whether retailers
 4 moved from All Risks to Crump is irrelevant to Crump’s claims of wrongdoing against All
 5 Risks. Again, All Risks seems to be confused about the nature of Crump’s lawsuit. As noted
 6 above, Crump is suing McGrath for breaching his duty of loyalty by recruiting Crump
 7 employees while on Crump’s payroll and is suing All Risks and McGrath for misappropriating
 8 Crump’s trade secrets and interfering with Crump’s employees and customers. Whether any
 9 customers may have moved from All Risks to Crump is simply not the gravamen of these claims
 10 of wrongdoing against McGrath and All Risks.

11 Similarly, All Risks again asserts that responsive documents will prove that it is an
 12 accepted and common industry practice for retailers to move with brokers when they change
 13 employers. *All Risks MPA* at 11:10-12. However, as noted above, no such practice would ever
 14 permit McGrath to breach his fiduciary duty of loyalty or permit McGrath or All Risks to
 15 misappropriate Crump’s trade secrets.

16 All Risks also argues that “the request speaks directly to Defendant’s affirmative defense
 17 of unclean hands.” *All Risks MPA* at 11:13-14. However, All Risks cites no case for the
 18 proposition that simply asserting the unclean hands defense entitles a defendant to discover
 19 information about unrelated customers that it may have lost to the plaintiff. To the contrary, the
 20 unclean hands defense “applies only if the inequitable conduct occurred in a transaction directly
 21 related to the matter before the court and affects the equitable relationship between the litigants.”
 22 *California Satellite Systems v. Nichols*, 170 Cal.App.3d 56, 70, 216 Cal.Rptr. 180, 188 (1985).
 23 Here, there is no evidence that any customer at issue in this lawsuit switched business from All
 24 Risks to Crump within the last five years. Further, any decisions by unrelated third parties (or
 25 even customers at issue in this lawsuit) to switch business from All Risks to Crump would not
 26 be “directly related” to the claims that Crump is bringing in this action against All Risks and
 27 McGrath, nor would they of themselves affect the equitable relationship among Crump, All
 28 Risks and McGrath.

Even if evidence of any such decisions could be somehow relevant to All Risks' unclean hands defense, this Court may limit its discovery absent a showing by All Risks that there has been some wrongdoing. District courts are authorized "to invoke the Federal Rules of Civil Procedure when necessary to prevent employers from using the discovery process to engage in wholesale searches for evidence that might serve to limit its damages for [their] wrongful conduct." *Rivera*, 364 F.3d at 1071. In *Rivera*, the defendant employer sought to discover plaintiffs' immigration status to support its affirmative defense of after-acquired evidence, which is based on the unclean hands doctrine. *Id.* at 1071. The Ninth Circuit affirmed an order prohibiting the discovery, disagreeing with the notion that "depositions could be conducted for the purpose of uncovering illegal actions," *id.* at 1071, and noting that there was no evidence that the employer would have fired the plaintiffs had it known that they were undocumented. *Id.* at 1072. Here, there is no evidence that Crump obtained any All Risks customer by misappropriating All Risks' trade secrets, using All Risks' confidential information, or breaching a fiduciary duty to All Risks. Further, there is no evidence that Smith solicited Crump employees to leave while she was Crump's employee, that she misappropriated Crump's trade secrets, or that she violated California law in any manner. Thus, even if the broker of record letters were somehow relevant to Defendants' unclean hands defense, this Court may nevertheless limit their discovery absent some showing by All Risks of wrongdoing on the part of Crump and Smith.

For these reasons, this Court should deny All Risks' request to compel production of the broker of record letters.

III. Crump will produce Peter Scott's chart and make him available to be deposed regarding the chart.

All Risks moves to compel production of a chart that Crump's President Peter Scott created, which lists business that McGrath wrongfully took to All Risks and all broker of record letters changing from Crump to All Risks after McGrath left Crump. Crump will produce the chart and make Mr. Scott available to be deposed regarding the chart at a mutually convenient time. So this issue is moot.

1 **IV. Crump has not withheld any documents described by Glenn Hargrove.**

2 As All Risks acknowledges in its Motion to Compel, Crump's counsel already told All
 3 Risks' counsel in writing, before All Risks filed its Motion, that "[w]e have not withheld any
 4 document that fits the description in Mr. Hargrove's testimony." *All Risks' MPA* at 7:24-27.
 5 Mr. Hargrove's recollection was simply incorrect, and there is no such document that fits the
 6 description in his testimony. Nevertheless, All Risks continues to insist that Crump produce
 7 such documents, blindly accusing Crump of discovery violations. *All Risks' MPA* at 14:1-15:24.
 8 Because the document simply does not exist, there is nothing further for Crump to produce, and
 9 All Risks' quixotic crusade is a complete waste of this Court's time.

10 **V. Crump has already confirmed that it has produced all responsive documents,
 11 including any from McGrath's hard drive.**

12 As noted above, Crump's counsel advised All Risks' counsel in writing, before All Risks
 13 filed its motion to compel, that "*we have not withheld any responsive documents from
 14 production*, other than as identified in our privilege logs," that "we have made a good faith
 15 effort to ascertain whether any additional responsive documents exist," and that "[w]e will serve
 16 amended responses indicating which categories, if any, did not contain any responsive
 17 documents" (emphasis in original). Because there were documents responsive to every
 18 category, Crump has not had to serve an amended response. Nevertheless, All Risks asserts that
 19 "Crump should be compelled to produce all responsive documents located in Defendant
 20 McGrath's hard drive." *All Risks' MPA* at 15:25-26. However, all responsive documents have
 21 already been produced. Again, there is nothing further for Crump to produce and nothing for
 22 this Court to compel.

23 **VI. This Court should not compel further depositions of Scott or Hargrove (or any
 24 other Crump employee).**

25 All Risks argues that this Court should compel further depositions of Scott and Hargrove
 26 "[b]ecause Crump failed to timely produce these documents." *All Risks MPA* 23:25-24:4.
 27 However, because this Court should not compel any production, this Court should not compel
 28 any more depositions of Crump employees.

CONCLUSION

For the reasons stated above, this Court should deny All Risks' motion to compel.

DATED: July 16, 2008

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